IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1795

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital,

Respondents.

KURT R. STRAUBE, M.D.,

Petitioner,

v.

ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D., TO AND INCLUDING FIFTIETH DOE, M.D.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Richard K. Helm, M.D.

July 1, 1976

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AUTHORITIES CITED

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Respondents Roger G. Larson, Emanuel Lutheran Charity Board, Robert Seapy, M.D., and Richard K. Helm, M.D., respectfully urge the Court to deny Petitioner's request for a Writ of Certiorari in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but is attached to the Petition as Exhibit A. The opinion of the District Court is not reported but is attached to the Petition as Exhibit B.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Whether the existence of governmental contacts with a private institution renders conduct of that institution which is unrelated to the governmental contacts state action subject to Constitutional regulation.

STATUTE INVOLVED

42 U.S.C. § 1983 is set forth in the

Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case accurately reflects the allegations of his Complaint upon which the opinions below were based and the procedural history of this litigation.

REASONS FOR DENYING THE WRIT

The question presented in this case was resolved by this Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which stated that where governmental contacts with a private institution were not so pervasive as to make that institution lose its essentially private character, there must be a nexus between the governmental contacts alleged and the conduct complained of before that conduct can fairly be characterized as state action. Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. Plaintiff relied on the liquor licensing provisions of Pennsylvania law. This Court held that the practice of racial

discrimination was not state action, even though the club was subject to extensive government regulation by virtue of its liquor license. "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 176 - 177.

Numerous attempts have been made to label any action of a purely private hospital state action by virtue of the fact that the hospital receives Federal funds under the Hill-Burton Act and has other incidental governmental contact. The United States Courts of Appeals for the Second, Fifth, Seventh, Ninth and Tenth Circuits have each held that the actions of a private, non-profit hospital do not constitute state action merely by reason of the hospital's receipt of Hill-Burton funds, tax advantages or other incidental governmental

contacts absent some connection between the governmental contacts and the action complained of. Barrett v. United Hospital, 376 F.Supp 791 (S.D.N.Y., 1974), aff'd, 506 F.2d 1395 (2nd Cir., 1975), Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (5th Cir.), cert. denied, 44 U.S.L.W. 3328 (December 2, 1975), Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir., 1973), Ascherman v. Presbyterian Hospital, 507 F.2d 1103 (9th Cir., 1974), Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

The Eighth Circuit in Klinge v. Lutheran Charities Association, 523 F.2d 56 (8th Cir., 1975), did not decide this question since the Defendant Hospital conceded Plaintiff's position and the Court never had to address it.

The Sixth Circuit's early decisions did ignore the nexus requirement, but, subsequent to this Court's decision in Moose Lodge, that Circuit reversed its position and held that the receipt of Hill-Burton funds alone did not make

conduct of a private hospital state action. Jackson v. Norton Children's Hospitals, Inc., 487 F.2d 502 (6th Cir., 1973).

Plaintiff, in his Petition, asserts that there is a split within the Tenth Circuit because of the early decision of Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir., 1971). In that case, the hospital did not challenge Plaintiff physician's assertion that its conduct amounted to state action. In Ward v. St. Anthony Hospital, supra, the Court restated its long-standing rule that "the claimed involvement must be associated with the challenged activity" and held that since there existed no nexus between the governmental contacts alleged and the medical staff decisions of St. Anthony Hospital, such decisions were not state action. 476 F.2d at 675.

Thus, only the Fourth Circuit has consistently ruled that receipt of Hill-Burton funds alone transforms the conduct of a private hospital into that of a state agency.

CONCLUSION

A clear majority is emerging among the Circuits applying the nexus requirement outlined by this Court in the Moose Lodge decision with regard to the conduct of private hospitals receiving government funds. The split among the Circuits appears to be resolving itself and there is no compelling need for this Court to consider the question.

Respectfully submitted,

JONES, LANG, KLEIN,
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